

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6160

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HELEN K. TASSOP, d/b/a ST. ANDREW ACADEMY
ON THE SOUND; and TASSOP REALTY, INC.,

Defendants-Appellants

and

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION;
and ESTELLE LEIBOWITZ LUNGO, EXECUTRIX OF
ESTATE OF M. HOWARD LEIBOWITZ,

Defendants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

	Page
Statement of the issue presented-----	1
Statement of the case-----	2
Summary of argument-----	9
Argument:	
The District Court correctly entered judgment in favor of the Government and correctly ordered the sale of taxpayer's property for satisfaction of her liability-----	12
A. Introduction-----	12
B. Taxpayer is not entitled to further relief from the "consent" judgment of February 9, 1976-----	14
C. The alleged procedural irregularities in the assessment, of and administrative collection action taken with respect to taxpayer's liability for the period here in question do not affect either the amount of her liability or the right of the Government to enforce that liability-----	20
D. Taxpayer is not protected by any treaty against the sale of her property to satisfy her tax liability-----	26
Conclusion-----	28
Appendix-----	30

CITATIONS

Cases:

<u>Cleveland Trust Co. v. United States</u> , 421 F. 2d 475 (C.A. 6, 1970), cert. denied, 400 U.S. 819 (1970)---	23
<u>Luhring v. Glotzbach</u> , 304 F. 2d 560 (C.A. 4, 1962)---	23
<u>Rosenberg v. Commissioner</u> , 450 F. 2d 529 (C.A. 10, 1971)-----	23
<u>Smith v. United States</u> , 478 F. 2d 398 (C.A. 5, 1973)---	23
<u>United States v. Cirami</u> , 40 A.F.T.R. 2d 5677 (C.A. 2, Sept. 1, 1977)-----	14

Treaties and Statutes:

Agreement Between the Government of the United States of America and the Government of Greece for Financing Educational Exchange Programs, December 13, 1963, 14 U.S. Treaties 1770-----	26
Internal Revenue Code of 1954 (26 U.S.C.):	
Secs. 6201 through 6204-----	21, 22
Sec. 6303-----	23
Sec. 6331-----	24
Sec. 6337-----	25
Sec. 6501-----	23
Sec. 6502-----	23
Sec. 6861-----	21
Sec. 6862-----	21
Sec. 7402-----	12, 30
Sec. 7403-----	12, 30
Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, February 2, 1848, 9 Stat. 922-----	26

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6162

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HELEN K. TASSOP, d/b/a ST. ANDREW ACADEMY
ON THE SOUND; and TASSOP REALTY, INC.,

Defendants-Appellants

and

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION;
and ESTELLE LEIBOWITZ LUNGO, EXECUTRIX OF
ESTATE OF M. HOWARD LEIBOWITZ,

Defendants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court properly reduced to judgment
federal employment tax assessments against the taxpayer^{1/} and
properly ordered the judicial sale of taxpayer's property in
satisfaction of that liability. |

1/ Helen K. Tassop will be referred to as "taxpayer."

STATEMENT OF THE CASE

This is an action brought by the United States to obtain judgment for unpaid federal employment taxes (plus penalties and interest) assessed against taxpayer for 21 taxable quarters and for the judicial sale of her property in satisfaction of that liability. Two parties holding mortgages on such property were also named as defendants. By a series of judgments and orders (all unreported) (R. 87a, 151a, 375a, 464a, 477a^{2/}), the District Court held that the United States was entitled to recover from taxpayer the sum of \$263,992.37 (with interest) for delinquent employment taxes and further held that the United States was entitled to satisfy that tax liability through the foreclosure of its tax liens and the judicial sale of taxpayer's property. The final judgment and foreclosure order were entered on July 27, 1977. (R. 464a-470a, 477a.) On September 26, 1977, taxpayer timely filed a notice of appeal to this Court. (R. 5a.) Sale of the property in question has been stayed pending resolution of the appeal. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.^{3/}

2/ "R." references are to the two-volume separately bound record appendix.

3/ As we previously indicated in a letter to the Court of January 20, 1978, the "finality" of the judgment and foreclosure order might be questioned on the ground that the amounts owing other lien holders had not yet been established. It was not until after July 27, 1977, however, that any controversy arose with respect to the claims of such persons. See footnote 7, infra. Under the circumstances, we believe, and taxpayer apparently agrees, that, since all matters then before the District Court were formally resolved in the judgment and foreclosure order, such orders were final for the purposes of appeal.

The material facts may be stated on follows:

The United States brought this action on September 9, 1975 to foreclose tax liens and to recover the amount of federal employment taxes which taxpayer was legally obligated to withhold from the wages of her employees at The St. Andrew Academy on the Sound, a private school affiliated with the Greek Orthodox Church. (R. 376a.) The complaint, with exhibits (7a-21a), named as defendants taxpayer, Tassop Realty, Inc. (her wholly-owned corporation), and two parties holding mortgages on property owned by the taxpayer or her corporation (Astoria Federal Savings and Loan Association and M. Howard Leibowitz^{4/}.) All of the defendants filed answers to the complaint. (R. 50a, 53a, 59a.)

At a conference before Judge Judd on February 6, 1976, taxpayer consented to judgment against herself in return for the Government's concession that certain tax liens were invalid. At Judge Judd's suggestion, the judgment was set at \$275,000, but was subject to modification as to the amount on application of either side within 30 days. (R. 90a-105a, 376a-377a.) This judgment was entered on February 9, 1976. (R. 87a.)

The time within which to apply for a correction of the judgment was extended to March 26, 1976, and on March 24, 1976, the Government

^{4/} M. Howard Leibowitz died during the pendency of this action and Estelle Leibowitz Lungo, executrix of the estate of M. Howard Leibowitz, was substituted as a defendant for him. (R. 185a-193a.)

moved to increase the amount of the judgment to \$297,093.50. The Government's motion was supported by a memorandum of law and the affidavit of George S. Alberts, the District Director of Internal Revenue for the District of Brooklyn, New York. Albert's affidavit was accompanied by a schedule of unpaid tax liability of taxpayer which showed the tax period in question, the type of tax, the date of assessment, the unpaid balance of taxes owed, the amount of penalties and interest, and a total balance due. (R. 107a-115a.) Taxpayer did not oppose this motion, and it was granted on May 7, 1976. An order correcting the judgment of February 9, 1976, was entered on May 27, 1976. (R. 3a, 151a.) Also on May 7, 1976, taxpayer's attorney of record, Peter Newman, sought and was granted leave to withdraw from the case. (R. 3a, 133a-137a, 377a.)

Taxpayer thereafter retained new counsel, and, on May 17, 1976, moved to amend the judgment. (R. 141a-150a.) This motion, and a motion by the Government for an order directing the sale of taxpayer's property to satisfy the judgment (R. 116a-125a), were heard at a hearing on May 27, 1976 (R. 227a-239a). At this time, Judge Judd stated that the motion for the sale of taxpayer's property would be granted. (R. 237a, 377a.) Taxpayer's motion regarding the amount of her tax liability was adjourned until June 25, 1976. (R. 3a, 235a, 377a.)

On June 22, 1976, taxpayer's attorney filed a lengthy memorandum of law requesting the court: (1) to vacate the judgment because of alleged misrepresentations by the Government's attorney and her former attorney at the time of the consent judgment, (2) to declare several of the Government's actions illegal, and (3) to reduce the amount of taxes owed by taxpayer to about \$13,000 according to a "statement of accounts" contained in the memorandum.^{5/} This motion was argued on June 25, 1976. Although a reporter was present, the reporter's transcription of the hearing cannot be located. (R. 378a.) At a subsequent hearing, one of the Government's attorneys (J. Brian Ferrel), who was present at the hearing, testified that Judge Judd denied the motion to amend and reopen the judgment, provided the Government file a response to the "statement of accounts" contained in taxpayer's memorandum of law. (R. 345a.) The docket entry for that date states (R. 3a): "Motion argued Decision reserved pending submission oof [sic] response by Govt and filing of Govt's motion for foreclosure and sale on 7-30-76." Judge Judd died soon after the hearing, but his notes from the hearing contain the following inscriptions: "Motion to reopen denied . . . Ct gives 35 days to respond on figures." (R. 378a.)

^{5/} This memorandum and a supplemental memorandum filed below, with added summary and conclusion, have been reproduced verbatim as taxpayer's brief on appeal.

After Judge Judd's death, the case was reassigned to Judge Neasher. The Government filed its response to the "statement of accounts" on July 27, 1976 (R. 164a-179a) and requested entry of an order directing the foreclosure and sale of taxpayer's property (R. 152a-160a). At this point, taxpayer's attorney fell seriously ill, and the matter was postponed for several months. In December, 1976, the Government and taxpayer met to attempt to work out an arrangement whereby the school could be continued under taxpayer's direction. Negotiations broke down, however, when she failed to provide necessary financial information concerning her ability to pay the taxes and continue to operate the school. (R. 379a.) A further conference, in March, 1977, before the District Court also proved unavailing and on April 22, 1977, the court conducted a further hearing (R. 271a-374a) "to penetrate the confusion surrounding this case" (R. 379a). Taxpayer's position in the District Court at that time was that the judgment should be reduced by four separate credits^{6/}. Taxpayer's first two points (R. 241a-242a) were that she had been charged twice for taxes in the second and fourth quarters of 1966. In each instance, however, the District Court determined that the record

^{6/} This position is set forth in a brief filed by taxpayer in May, 1977. (R. 240a-256a.) (The record appendix erroneously indicates that this brief was dated May 5, 1976. (R. 240a.) In fact, it refers to events occurring thereafter, and was filed with the District Court on May 10, 1977, following the hearing of April 22, 1977. (R. 4a.))

disclosed no duplication, and that taxpayer's evidence showed only a single payment for the first quarter of 1966, for which she was given credit. (R. 380a.)

Taxpayer also argued (R. 243a-244a) that seizures by the Government of two of her California properties were illegal because they were executed pursuant to liens which the Government had conceded were invalid in return for her consent to judgment. These liens encompassed various tax periods from 1969 to 1972. The District Court decided, however, that since the seizures were also undertaken in part with respect to an uncontested assessment for the first quarter of 1973, they "would appear to be valid." (R. 380a.) In any event, the court indicated that any claims taxpayer may have with respect to the California property would be subject to adjudication only in a separate proceeding respecting that sale, and would not affect this case. (R. 380a.)

Finally, taxpayer contended (R. 242a-243a) that an assessment in 1974 for the first two quarters in 1969 was time-barred because she filed her tax returns for those quarters three years prior to the assessment. The Government alleged that she did not file the returns, and argued further that even if she did file them she waived her right to contest the assessment at the time of the consent judgment. (R. 380a.) After a further hearing before Judge Neaher on this point on June 23, 1977 (R. 382a-442a), the court agreed with taxpayer that the 1974 assessment for two quarters

in 1969 was time-barred. (R. 472a-475a). Accordingly, on July 27, 1977, the \$297,093.50 judgment against taxpayer was reduced to \$263,992.37 pursuant to the court's memorandum and order of the same date. (R. 471a-477a.) In addition, and also on July 27, 1977, the District Court entered an order directing the sale of taxpayer's property in satisfaction of the judgment entered in favor of the Government. (R. 464a-470a.)^{7/} Thereafter, taxpayer brought this appeal, and the District Court entered an order staying execution of the judgment in favor of the Government pending decision by this Court.

7/ The proceeds of the sale of taxpayer's property were to be distributed in accordance with the following priorities: first, all unpaid real estate taxes which are liens under local law; second and third, to Astoria Federal Savings and Loan Association and the Estate of M. Howard Leibowitz, respectively; and fourth, to the United States. Although it is not evident on the docket sheets, we have been informed that taxpayer, on September 15, 1977, filed a cross-claim against the estate of M. Howard Leibowitz, asserting that the mortgage held by the estate had been satisfied in full. On October 4, 1977, the estate filed a response to this cross-claim. This dispute has been referred to a United States Magistrate.

SUMMARY OF ARGUMENT

The United States brought this collection action seeking to recover unpaid employment taxes assessed against taxpayer for 21 taxable quarters. In her answer to the complaint, taxpayer admitted liability but denied that she owed as much as the Government alleged. At a hearing before Judge Judd, taxpayer, upon advice of counsel, agreed to consent to judgment provided she be allowed to file an application showing what she believed to be the correct amount of her liability. After discussion on this point by and between taxpayer, her counsel, Government counsel and Judge Judd, the court entered judgment in the amount of \$275,000, subject to modification upon application by either party.

The Government then filed a motion seeking to increase the judgment to approximately \$297,000. Since the Government's motion went unopposed and since taxpayer had not filed any application to reduce the judgment within the time prescribed by the court, the judgment was accordingly increased.

After obtaining new counsel, taxpayer moved to reduce the judgment. At a hearing before Judge Judd, her motion was denied. Judge Judd died shortly thereafter, and no transcript was ever made of this hearing. The case was then assigned to Judge Neaher, who again heard arguments by taxpayer concerning the proper amount of her liability. Judge Neaher rejected all of her arguments except one concerning the collection of taxes for the first two quarters in 1969. Judge Neaher decided

that the statute of limitations barred the collection of taxes for those two quarters, and, consequently, the judgment was reduced to approximately \$264,000.

Taxpayer appeals from the judgment taken against her. She first asserts that the judgment should be set aside, on the ground that it was originally entered into by mistake, inadvertence, excusable neglect and misrepresentation by her attorney and the Government's attorney. Taxpayer, however, has failed to substantiate this claim. At the initial hearing held before Judge Judd, it was explicitly and repeatedly explained to her what the effect was of the consent judgment. No promises were made to her which were not kept. The transcript of the hearing, the testimony of the two attorneys involved at a hearing to consider this claim, an affidavit by her then counsel and the total lack of evidence on this point by taxpayer all show that this argument by taxpayer is baseless.

In any event, it is clear that taxpayer was not prejudiced by the initial, non-final "consent" judgment. Indeed, she has never denied liability for unpaid employment taxes, but has simply questioned the amount of such liability. Moreover, the initial judgment entry was subject to application by either side to amend the amount of the judgment. While taxpayer originally failed either to oppose the Government's application for an increase in the amount of the judgment, or to file an application for a reduction in the amount of the judgment within

the time limits prescribed by the District Court, her contentions in this regard ultimately were heard both by Judge Judd, and again by Judge Neaher. Indeed, Judge Neaher ruled on the merits of all of her assertions, holding in her favor as to the statute of limitations question, but properly rejecting the balance of her contentions. Thus, there is no merit to her claim that she has been denied due process or her Constitutional right to a trial in this case.

Taxpayer's second major argument concerns two factual matters which were not reached by the District Court, since their resolution was irrelevant to the resolution of this case. First, taxpayer asserts that the employees of the Internal Revenue Service did not properly follow the guidelines set forth in an Internal Revenue Service manual of instructions in regard to one assessment against her. Since this manual does not have the force and effect of law, however, and since it is only a control document for the Internal Revenue Service, any failure to strictly follow the procedures contained therein does not absolve taxpayer of her liability for unpaid taxes, nor would it give rise to any remedy sought by taxpayer. Second, taxpayer argues that she did not receive notice and demand of that same assessment complained of above, and consequently, that a levy on her property in California was illegal. But the levy was made also pursuant to another assessment for which notice and demand was admittedly given.

And, in any event, the propriety of that levy would not alter her liability in this case, or the right of the Government to have its liens on the property here in question to be foreclosed.

Taxpayer's remaining set of arguments, concerning violations of the Constitution, violations of treaties with Greece and Mexico, and schemes to illegally take her property, are not only unsupported by the record, but are also so patently absurd that they deserve little comment. Clearly, neither of the treaties cited by taxpayer protect her against foreclosure of liens against her property. In this regard she stands in the same position as would any other taxpayer who fails to pay taxes duly owing.

ARGUMENT

THE DISTRICT COURT CORRECTLY ENTERED JUDGMENT IN FAVOR OF THE GOVERNMENT AND CORRECTLY ORDERED THE SALE OF TAXPAYER'S PROPERTY FOR SATISFACTION OF HER LIABILITY

A. Introduction

The United States brought this suit in the District Court to reduce unpaid employment tax assessments to judgment, and to have taxpayer's property sold in satisfaction of that liability. The court clearly had the jurisdiction to grant the United States the relief it sought. Section 7402(a) of the Internal Revenue Code of 1954, Appendix, infra, provides that the District Court shall have the jurisdiction "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." In addition, Section 7403 of the Code, Appendix, infra, expressly authorizes the Government to bring actions in the District Courts to foreclose tax liens of the United States,

or to subject any property of delinquent taxpayers to the payment of such tax liabilities. This section expressly provides for the sale of a delinquent taxpayer's property to satisfy a claim of the United States.^{8/} These sections thus complement the administrative collection remedies provided in the Code^{9/} by providing for the collection of the revenues by means of judicial process.

On appeal, taxpayer raises several arguments in support of her contention (Br. 67) that the foreclosure order be vacated and that this case be remanded to the District Court for a new trial.^{10/} Those contentions were properly rejected in the court below.

^{8/} On appeal (Br. 38-46), taxpayer appears to argue that the District Court had no jurisdiction to order the sale of taxpayer's property. Taxpayer is plainly in error in this assertion. Section 7403, entitled "Action to Enforce Lien or to Subject Property to Payment of Tax" states that a taxpayer's property may be sold to satisfy a taxpayer's liability. There is no requirement in this section, as there is in Section 6331 (26 U.S.C.) (the section which provides for administrative collection procedures), for notice and demand. In addition, there is no requirement that the United States have a lien on any of taxpayer's property before a judicial sale can occur. Rather, Section 7403 allows such an action "In any case where there has been a refusal or neglect to pay any tax" (emphasis added).

^{9/} Section 6331 of the Code, entitled "Levy and Distraint," provides that if any person liable to pay any tax refuses to do so within 10 days of notice and demand, the Secretary of the Treasury can collect the delinquent taxes by levy. The term levy includes the power of distraint and seizure by any means.

^{10/} Several of taxpayer's arguments and assertions are extremely confusing. This confusion, however, can be alleviated (in part) by the recognition that taxpayer's brief (Br. 1-69) is largely a duplication of the memorandum of law she submitted to the District Court on June 22, 1976, which we referred to on page 4, supra, and a supplemental memorandum filed below one or two days thereafter. Recognition of the duplication explains why taxpayer fails to refer to any hearing, judgment or order of the District

B. Taxpayer is not entitled to further relief
from the "consent" judgment of February 9, 1976

On February 6, 1976, a hearing was scheduled before Judge Judd on the Government's motions for a protective order (R. 79a-82a) and a contempt order (R. 83a-86a). Prior to the convening of this hearing, taxpayer's counsel^{11/} and the

10/ (continued)

Court held or made after June 22, 1976. Thus, taxpayer's argument (Br. 47) concerning the statute of limitations is irrelevant to this appeal, since the District Court accepted the argument and the Government chose not to appeal the court's decision.

11/ Taxpayer's counsel at this stage of the proceedings was Peter Newman. Newman was also the original counsel for the taxpayers in United States v. Cirami, 40 A.F.T.R. 2d 5677 (C.A. 2, Sept. 1, 1977), where this Court held that taxpayers' claim that Newman's failure to respond to a motion for summary judgment, filed in December, 1973, was due to psychiatric problems fell within the scope of the provisions of the Federal Rules of Civil Procedure, Rule 60(b)(6), as grounds for relief from the default judgment there entered against the Ciramis. In Cirami, Newman apparently stopped acting as counsel, without notifying either his clients or the court. This Court stated (40 A.F.T.R. 2d, p. 5683):

In the present case we have the possibly unique fact of what we may term the "constructive disappearance" of defendants' attorney, who was allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, and who had made himself unavailable even to the trial judge.

In the instant case, Newman did not disappear, either constructively or otherwise, but rather was actively representing his client (taxpayer), as evidenced by his zealous attempts at discovery. (R. 63a-65a, 66a, 67a, 68a, 69a, 70a.) In fact, Newman's conduct in the defense of his client precipitated the Government filing a motion for a protective order. (R. 79a-82a). It was at the hearing to decide this motion (and a Government motion for contempt) that Newman and the Government's

judgment. Newman eventually was allowed, by the court, to withdraw as counsel for taxpayer (R. 3a) after filing a motion for leave to withdraw (R. 133a) accompanied by an affidavit (R. 134a-137a) which alleged that taxpayer refused to cooperate in the defense of the case, refused to supply needed "financial operating information," and wished him to advocate a position (that taxpayer did not know the force and effect of the consent judgment) which he did not believe existed.

12/ As explained by Ferrel in a hearing before Judge Neaher, the concession was made simply to facilitate settlement of the case, for the validity of these two liens "was a matter of principle with Miss Tassop." (R. 342a-343a.) As Judge Neaher recognized (R. 356a-357a), a concession such as this "is a common thing lawyers do every day."

Government^{12/} agreed that the Government would concede that two of its liens were not valid (R. 93a) if taxpayer would consent to entry of judgment (R. 94a). This "settlement" was made before Judge Judd and is fully transcribed. (R. 88a-105a.) Newman repeatedly explained to taxpayer that she was consenting to judgment and that the Government would have the power to immediately execute on that judgment. (R. 94a-95a, 98a.) Newman's explanation to his client was echoed by both Government counsel (R. 95a, 96a) and the court (R. 95a, 103a-104a). It was also made clear that either side could file applications to amend the amount of liability. (R. 103a-104a.)

11/(continued)

counsel (Ferrel) reached the decision to enter into a "consent"

The judgment was entered, on February 9, 1976, in the arbitrary amount of \$275,000 (R. 87a). The Government filed a motion (R. 107a-115a) to increase the judgment on March 24, 1976, one and one-half months after the judgment had been entered. On May 7, 1976, the court granted the Government's motion. (R. 3a, 151a.) Taxpayer had not opposed the Government's motion, or filed any motion on her own suggesting a liability different from the \$275,000 previously entered, or the \$297,093.50 thereafter urged by the Government.

On May 17, 1976, after taxpayer had obtained new counsel, she filed papers (R. 141a-150a) disputing the tax liability asserted by the Government. These papers did not state what taxpayer believed her liability to be. The court scheduled a

hearing on taxpayer's motion for June 25, 1976 (R. 3a, 377a), and, on June 22, 1976, taxpayer filed a memorandum of law in support of her position.

While a reporter was present at the hearing on June 25, 1976, a transcript cannot be located. (R. 378a.) At a subsequent hearing held on April 22, 1977, before Judge Neaher, the attorney for the Government testified (R. 345a-346a) that Judge Judd had denied taxpayer's motion, on the condition that Ferrel submit an affidavit responding to a "statement of account" set forth in taxpayer's memorandum of law. Such a response was thereafter filed. (R. 164a-179a.)

A further hearing was thereafter held before Judge Neaher on April 22, 1977 (R. 271a). While taxpayer failed to present one shred of evidence in support of her claims, the Government called both Ferrel and Newman to testify as to the circumstances surrounding the consent judgment. Newman testified, on direct and cross-examination, that he discussed the "settlement" with taxpayer several times (R. 319a) and that he explained it to her in detail (R. 328a-329a). Indeed, the transcript (R. 92a-105a) of the February 6, 1976 hearing fully supports Newman's testimony. The detailed explanations by taxpayer's attorney, the Government's attorney and the court clearly show that the "consent" judgment was not entered into due to mistake, inadvertence, surprise, or excusable neglect. As Judge Neaher stated at the April 22, 1977, hearing (R. 313a): "one would have to conclude that it was a judgment entered with full understanding of its legal consequences."

Moreover, no showing was made that either attorney misrepresented anything to taxpayer. Ferrel stated only that the Government would consider, in good faith, any offer in compromise submitted by taxpayer (R. 95a, 96a) and would concede that two liens were invalid (R. 93a, 343a-344a). Taxpayer does not allege and has not offered any proof that the Government breached these "promises." Moreover, there has been no showing that taxpayer's counsel misrepresented anything to her. (R. 322a-325a, 328a-329a.) Consequently, taxpayer's assertions of "misrepresentation" are baseless.

In any event, taxpayer's position in this litigation simply was not materially prejudiced by entering into this non-final judgment. Taxpayer had never denied that she was delinquent in the payment of the employment taxes in question. Rather, she was only contesting the amount of that liability.^{13/} But the consent judgment was entered on the specific condition that either party could move, within 30 days, to modify the amount of this judgment, and taxpayer indicated that she was fully aware of this provision. (R. 104a.) Yet, she failed either to oppose the Government's motion to increase the amount of the liability, or to file an application to reduce it until after the Government's motion was ruled on by the court. Indeed, Newman testified before Judge Neaher that he was not able to prepare a statement or motion showing taxpayer's version of her liability because she was "totally uncooperative." (R. 329a-331a.) In addition, in his affidavit attached to his motion to be relieved as counsel, he asserts that taxpayer had "consistently refused to cooperate with the defense of this action" (R. 134a), that she would not supply financial operating information (R. 134a-135a) and that attempts to

^{13/} In the answer she filed to the complaint (R. 59a-62a), she admits almost every material allegation made by the Government in the complaint (R. 7a-20a), including: (1) "assessments [were] made against the Defendant as alleged" (R. 60a), and (2) that demand for payment was made as alleged, with two exceptions (R. 61a).

perform an audit on her books have proved fruitless since she will not make an appointment with the person hired to do the audit (R. 136a).^{14/}

Moreover, when her objections ultimately were formally presented, they were properly rejected both by Judge Judd and by Judge Neaher, who concluded (R. 380a-381a) that, of the four claims then pressed by her (R. 240a-246a), only one of them warranted further hearing on the merits. (On that claim-- i.e., that the statute of limitations had run as to the first two quarters of 1969--the court ultimately ruled in her favor. See footnote 10, supra.) As to the rest, she had simply presented nothing to the District Court that would indicate either that the Government's determinations as to the amount of her liability were wrong or that would preclude it from enforcing that liability against the property here in question. (R. 380a.) Since the judgment is amply supported by the record (R. 110a-111a, 164a-179a), there is no reason to set aside the District Court's determinations in this regard.^{15/} In short, far from

^{14/} At a hearing on May 27, 1976 before Judge Judd (referred to previously on p. 4), the court aptly observed (R. 233a): "Her troubles are largely what's called self-inflicted wounds." Taxpayer's counsel replied: "I have no quarrel with that."

^{15/} The arguments set forth in the "statement of accounts" portion of taxpayer's brief (pp. 47-53) have been fully dealt with in the response filed at the request of the court below on this point (R. 164a-179a), and, hence, we will not burden this brief with a repetition of the points set forth in detail therein.

denying taxpayer a fair trial on the amount of her liability, it is clear that the District Court gave her every opportunity to show why the liability was less than that set forth in the amended judgment. Except as to the question of the timeliness of the assessments for the first two quarters of 1969, she simply failed to do so.

- C. The alleged procedural irregularities in the assessment of, and administrative collection action taken with respect to taxpayer's liability for some periods here in question do not affect either the amount of her liability or the right of the Government to enforce that liability

Taxpayer next argues (Br. 19-37) that because of asserted violations of "laws, regulations and procedures" by the Internal Revenue Service, the District Court should have enjoined the collection of some of the taxes in issue, declared certain liens void, and declared that the administrative seizure and sale of some of her property in California was illegal. These contentions are without merit.

1. Taxpayer first spends considerable time (Br. 19-28) discussing a factual issue (proper delegation of authority to make a "prompt" assessment) which is simply irrelevant to the question of her tax liability and the right of the Government to have her property sold in satisfaction of that liability. Taxpayer's argument is that the assessment procedure used by certain employees of the Internal Revenue Service for one assessment covering several taxable quarters was improper. In the first

place however, it appears that the issue of improper assessment procedures has been waived by taxpayer. At the February 6, 1976 hearing before Judge Judd, taxpayer's counsel stated (R. 93a, 339a): "We are not questioning the validity of the assessment process." Moreover, while she thereafter sought to raise such a contention in her memorandum of law filed on June 22, 1976 (which she repeats here (Br. 19-28)), her counsel stated to Judge Neaher at the April 22, 1977 hearing (R. 291a-292a) that taxpayer was raising only the four specific contentions thereafter considered in his memorandum order of June 6, 1977 (R. 375a-381a). The contentions previously made with respect to the validity of the assessment for the period covered by the last quarter of 1969, first, second and fourth quarters of 1970 and first, second, and fourth quarters of 1971 was not renewed by her at that time. In any event, however, taxpayer is fundamentally wrong in her contentions on this issue. The Internal Revenue Code provides, in essence, for two types of assessments. Authority for the first type, or what may be called a regular assessment, is found in Sections 6201 through 6204 of the Code (26 U.S.C.). The second type, called a jeopardy assessment, is provided for in Sections 6861 and 6862. A jeopardy assessment can only be made when the Secretary believes that the collection of the tax in question will be jeopardized by delay. The instant case, however, does not involve jeopardy assessments. Rather, taxpayer was assessed pursuant to the ordinary assessment

provisions of Sections 6201 through 6203. Taxpayer's dispute in this regard is not that the Government violated any statutory dictate, or that the Government breached any regulation, but rather that the Internal Revenue Service did not follow certain guidelines outlined in the Internal Revenue Manual in the case of "prompt" assessments.

The Internal Revenue Manual is a control document which sets forth the procedures and guidelines for Internal Revenue Service employees in various situations. In the instant case, a "prompt" assessment was made against taxpayer. A "prompt" assessment (which should not be confused with a jeopardy assessment) is a term of art found only in the manual, and is used to describe a procedure for making an assessment against a taxpayer in less time than would otherwise be the case. A prompt assessment, however, in no way impinges on a taxpayer's statutory or Constitutional rights.

The District Court did not make any findings of fact in regard to the issue of whether the procedures for making a prompt assessment were followed. (Indeed, as noted, taxpayer did not renew this contention before Judge Neaher.) But assuming, arguendo, that the guidelines specified in the Manual were not followed to the letter, as taxpayer asserts, this "violation" does not give rise to any remedy for an "aggrieved," delinquent taxpayer. The procedural steps enunciated in the Manual certainly do not have the force and effect of law or Regulations. These procedural steps are not mandatory upon the

employees of the Internal Revenue Service, but rather, they are merely directory. Consequently, taxpayer is not entitled to the relief she seeks for the alleged violations of the procedures therein contained. See, e.g., Smith v. United States, 478 F. 2d 398, 400 (C.A. 5, 1973); Rosenberg v. Commissioner, 450 F. 2d 529, 531-533 (C.A. 10, 1971); Cleveland Trust Co. v. United States, 421 F. 2d 475, 480-482 (C.A. 6, 1970), cert. denied, 400 U.S. 819 (1970); Luhring v. Glotzbach, 304 F. 2d 560 (C.A. 4, 1962).^{16/}

2. Taxpayer's second argument in regard to improper procedures by the Government (Br. 28-37) is again a factual contention which is legally irrelevant to this case. She asserts that she was not given proper "notice and demand" (as described in Section 6303 of the Code (26 U.S.C.)) of taxes due with respect to certain of the assessments in question and that the levy on certain property in California

^{16/} The making of an assessment is not a prerequisite for bringing a collection action (as it is in the case of administrative collection procedures), and, thus, a failure to make a valid assessment could only affect the timeliness of such an action under Section 6501 of the Code (26 U.S.C.). Once an assessment is made, Section 6502 provides for an additional six years for collection by levy or by a proceeding brought in court.

was improper because a levy cannot be made until after notice and demand is given.^{17/} Section 6331 of the Code. But as the District Court noted in this regard (R. 380a), it was unnecessary to decide whether or not notice and demand had, in fact, been given since any administrative irregularities in that administrative collection action would simply have no bearing in the instant case. In the first place, while taxpayer questions whether notice and demand had been properly given with respect to the assessments of May 16, 1972, and August 2, 1972, with respect to nine taxable quarters within the years 1969, 1970, 1971 and 1972 (R. 18a),^{18/} the taxpayer does not

^{17/} As noted above (footnote 8), the requirement of notice and demand applies only in the case of administrative collection procedures, and does not apply as a prerequisite to bringing an action to reduce a tax liability to judgment or to enforcing such a judgment against the taxpayer's property.

^{18/} In her answer (R. 59a-62a), taxpayer admitted receiving notice and demand with respect to all of the other assessments involved herein. Indeed, with respect to the assessments of May 16, 1972 and August 2, 1972, she merely denied that demand had been made on the dates specified by Exhibit A to the Government's complaint. Nevertheless, the liens for these assessments were the ones conceded to be invalid on the condition that plaintiff would agree to the "consent" judgment entered on February 9, 1976. As noted above, however, whether or not there were valid liens under these assessments, the Government is still entitled to reduce her underlying liability (which in no way depends on receiving notice and demand for payment) to judgment and to enforce that judgment against the property in question here.

deny that, as the District Court noted (R. 380a), the levy on her California property was made not only pursuant to these assessments, but was also made, in part, pursuant to an assessment of September 17, 1973, as to which she admittedly received proper notice and demand (R. 216a-217a). Thus, even assuming the liens under the earlier assessments were invalid, the levy was proper.^{19/}

In any event, any procedural defects in the administrative collection action would not affect her liability here. Indeed, the seizure and sale of such property served to reduce her liability since it was applied to an open period in issue in this case. (See footnote 19, supra.) Moreover, to the extent taxpayer's objection relates to the amount for which the property was sold (Br. 31), her remedy, of course, was to redeem the property under Section 6337 of the Code (26 U.S.C.). And finally, of course, whatever remedies she might have with respect to setting aside that sale on the basis of the alleged procedural irregularities, her liability for unpaid taxes remains the same (or greater if, in fact, the sale is set aside). Thus, as the District Court noted (R. 380a), her claims in this regard have no bearing on the instant case.

^{19/} To be sure, as taxpayer pointed out below (R. 220a, 226a), a revenue officer's report of sale indicates that the net proceeds of the sale of the California property may have been applied to the last quarter of 1969, rather than to a period covered by the assessment of September 17, 1973. Even assuming arguendo, that it should have been applied, first, to a later period, taxpayer was in no way prejudiced since, in either case, the application of the proceeds would serve to reduce her remaining liability at issue here by the same amount.

D. Taxpayer is not protected by any treaty against the sale of her property to satisfy her tax liabilities

20/
Taxpayer's final argument (Br. 62-66) is that the Government is somehow barred from enforcing her unpaid tax liability against the property in question by an agreement between the United States and Greece as well as by the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hidalgo), February 2, 1848, 9 Stat. 922. Those arguments are patently absurd. Nothing in either of these agreements would in any way protect the property of a United States taxpayer from being sold to satisfy such taxpayer's unpaid tax liabilities. The agreement with Greece, Agreement Between the Government of the United States of America and the Government of Greece for Financing Educational Exchange Programs, December 13, 1963, 14 U.S. Treaties 1770, merely provides for the establishment of a foundation to be funded by the Governments of Greece and the United States to finance educational activities of United States citizens in Greece and Greek citizens

20/ Taxpayer's additional argument (Br. 54-58) that she has been denied a fair trial in this case (see also Br. 38-46) is fully dealt with under Subheading B, supra. Moreover, her argument that agents of the Internal Revenue Service have been "scheming" to close her school (Br. 59-61) is beside the point. She has alleged nothing that would indicate that it was an abuse of process for the Government to institute this action, and, to the extent that there are unsatisfied tax liabilities owing by the taxpayer (which she admits even though she disputes the amount of such liability) the Government is clearly entitled to reduce such liability to judgment and to enforce such judgment against her property. The fact of the matter is that over a period of several years she failed to withhold and pay over the employment taxes in question from the salaries of the employees of that school as required by law. The fact that her business, in this instance, is a school, may be unfortunate. But it does not absolve her of her obligations imposed under the Internal Revenue Code, nor does it exempt her from the ordinary consequences of failing to satisfy those obligations.

and nationals in United States schools and to promote related educational and cultural programs. It in no way obligates the United States to refrain from enforcing its tax laws against privately owned schools such as that of the taxpayer here, regardless of the religious or national affiliations of such a school.

Similarly, the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, has nothing to do with the resolution of this case. Indeed, Article IX of that treaty, as it was ratified by the Senate, (9 Stat. 930) simply provides that Mexicans who resided within the territories ceded to the United States at that time and who did not retain their Mexican citizenship would be entitled to "the enjoyment of all the rights of citizens of the United States." The additional material quoted by taxpayer (Br. 64) respecting property owned by religious organizations within that territory was part of the original treaty as signed, but not of the treaty as ratified.^{21/} And even if it had been included in the ratified treaty and had extended to property of such religious organizations throughout the United States, it still would not protect the property here in question since (1) it does not purport to apply to tax liabilities in any event, and (2) the school here in question did not belong to any such religious organization, but rather was the private property of the taxpayer and her wholly owned corporation, Tassop Realty, Inc., as she admitted in her answer herein. (R. 11a, 12a) As such, the property is clearly subject to sale for the satisfaction of her tax liabilities arising out of the operation of that property.

^{21/} Indeed, the Establishment Clause of the First Amendment would prohibit the United States from entering a "partnership" guaranteeing the support of schools affiliated with religious institutions, as taxpayer argues it did under this treaty. (Br. 64.)

CONCLUSION

For the foregoing reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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FEBRUARY, 1978.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing two copies thereof to each of them on this 28th day of February, 1978, in an envelope, with postage prepaid, properly addressed to them as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) To Issue Orders, Processes, and Judgments.--The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

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SEC. 7403. [As amended by Sec. 1906(b)(13)(A) and Sec. 2004(f)(2), Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520.]
ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO
PAYMENT OF TAX.

(a) Filing.--In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) or 6166A(h) shall be treated as a neglect to pay tax.

(b) Parties.--All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) [As amended by Sec. 107(b), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] Adjudication and Decree.--The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale

of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership.--In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

CASE NO. 77-6162

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Term, 19

UNITED STATES OF AMERICA,

Plaintiff-Appellant

vs.

HELEN K. TASSOP, d/b/a ST. ANDREW ACADEMY ON THE
SOUND; and TASSOP REALTY, INC.,~~Defendants-Appellants~~
Appellees

The Clerk will enter our appearances as Counsel for the

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